Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

NANCY LYNNE MOYER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Circuit Court of Appeals held that the prosecution of a physician under 18 U.S.C. § 1365(a), the Federal Anti-Tampering Statute, was authorized by the Commerce Clause on the ground that the physician diverted a few milliliters of morphine for her personal use and thereby depleted in some insubstantial way the hospital's supply. The questions raised by this case are:

1. In light of United States v. Lopez, 514 U.S. 549 (1995), does 18 U.S.C. § 1365(a) apply absent a substantial impact on interstate commerce, and if so, is such an application constitutional?

2. Does the mere presence of a jurisdictional element in 18 U.S.C. § 1365(a) satisfy the Commerce Clause and permit federal prosecution of a physician who allegedly diverted to her own use a few milliliters of morphine from a patient's intravenous line, where the diversion caused no demonstrable effect on interstate commerce?

These questions are directly related to the issue on which this Court recently granted certiorari in Jones v. United States, No. 99-5739, and likely will be governed by the decision to be reached in that case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nancy Lynne Moyer respectfully petitions that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix at 6) (hereafter "App. at 6") is reported at 182 F.3d 1018 (8th Cir. 1999). The order of the district court (App. at 1) is reported at 985 F. Supp. 924 (D. Minn. 1997).

JURISDICTION

The judgment of the district court was entered on March 27, 1998. The Eighth Circuit Court of Appeals filed its decision on July 23, 1999, and denied a timely petition for rehearing on September 15, 1999, with one judge voting to grant the petition. App. at 14. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The relevant section of the Federal Anti-Tampering Statute, 18 U.S.C. § 1365(a), provides:

> **§ 1365. Tampering with consumer products**
>
> (a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall *** be fined under this title or imprisoned ***.

STATEMENT OF THE CASE

Petitioner, a physician, was convicted of tampering with a consumer product after she diverted small amounts of morphine from patients' intravenous lines to her own personal use. Petitioner's actions did not constitute commercial activity, nor did they have any demonstrable -- much less substantial -- effect on commerce. Nonetheless, the Eighth Circuit affirmed Petitioner's convictions, concluding that the Commerce Clause requirements were satisfied by a judicially-postulated, theoretical impact Petitioner's actions might have had on the hospital's eventual need to replenish its morphine supplies.

The Eighth Circuit's expansive view of the federal government's ability to federalize local crime conflicts with decisions of several other circuits and with this Court's decision in United States v. Lopez, 514 U.S. 549 (1995).

The importance of the issues presented by this Petition is confirmed by this Court's recent decision to grant certiorari in Jones v. United States, No. 99-5739. In Jones, this Court will consider whether the federal arson statute (which contains a jurisdictional element similar to that in § 1365(a)) applies to arson of a private residence and, if so, whether the arson statute is constitutional in light of Lopez. The issues raised herein are, thus, important and timely.

Procedural Background

Following a jury trial in the United States District Court for the District of Minnesota, Petitioner Nancy Lynne Moyer was convicted on four of five counts of consumer product tampering in violation of 18 U.S.C. § 1365(a). The statute requires, among other elements, that the act of tampering affect interstate commerce. The District Court denied Petitioner's motion for a judgment of acquittal, rejecting arguments that the statute did not apply to the conduct alleged and that jurisdiction had not been established under the Commerce Clause. App. at A-1. Petitioner was sentenced to 70 months incarceration on March 27, 1998. The Eighth Circuit Court of Appeals affirmed the convictions on July 23, 1999 and denied Petitioner's petition for rehearing en banc on September 15, 1999. App. at 7, 14. Petitioner now brings this petition for a writ of certiorari seeking review of the lower courts' decision that the trivial and attenuated effect on interstate commerce allegedly caused by Petitioner's purely local activities was sufficient to invoke the federal police power.

Factual Background

Before and during medical school, Petitioner suffered from severe migraine headaches. While in medical school,

she discovered that Darvon (a narcotic painkiller) provided relief from her headaches. Her use of Darvon rapidly escalated to the point of abuse and addiction. Tr. II at 29-31.[1]

In January of 1997, Petitioner was in rotation in the intensive care unit ("ICU") at Methodist Hospital in St. Louis Park, Minnesota. The critically ill patients treated in the ICU routinely are prescribed narcotics for sedation and pain. Among the narcotic drugs that patients may receive is morphine sulfate, the consumer product at issue herein. Tr. III at 48.

The morphine sulfate prescribed at Methodist Hospital comes from an in-state supplier in bulk quantities and in concentrated form. The in-state supplier, in turn, obtains the drug from a wholesaler located outside of Minnesota. When a patient is prescribed morphine, concentrated morphine sulfate from the hospital's bulk containers is mixed with saline solution in the hospital pharmacy. The diluted morphine solution is then placed in a 50-milliliter pouch that locks into a plastic cassette case and is administered to patients by means of a pump. Any morphine solution remaining in the cassette after the patient has received what was prescribed is discarded. Tr. II at 134, 137, 140-41.

In January of 1997, Petitioner took small quantities of the diluted morphine solution on a total of six occasions. On each occasion, Petitioner inserted a sterile needle and syringe through an opening in the plastic cassette case and into the

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[1] "Tr." refers to the trial transcript, the Roman numeral to the volume, and the Arabic number to the page.

pouch encased within the cassette. That pouch contained a mixture of 6.7 milliliters of morphine and 43.3 milliliters of saline solution. Petitioner would remove a portion of the diluted morphine solution, and replace the lost volume with a like amount of sterile saline solution, again by means of a sterile needle and syringe. This procedure ultimately caused two of the six pouches to leak, requiring replacement of the cassettes. Tr. II at 62, 74, 134; Tr. IV at 36.

The actual amount of morphine that Petitioner diverted from the hospital's supply was small in both absolute and relative terms. The hospital pharmacy stocked concentrated morphine sulfate in bulk form consisting of 30-milliliter multi-use vials, with the hospital regularly maintaining between 100 and 200 of the multi-use vials in its stock. Tr. III at 110-20; Tr. II at 139-40. The evidence at trial established that, in total, twenty-five milliliters of the diluted solution were "wasted" from the two pouches that leaked. Joint Exhibits 1, 5; Tr. II at 47, 110. This total is only half the amount contained in a single 50-milliliter pouch. Twenty-five milliliters of diluted solution contains 3.35 milliliters (approximately one-half teaspoon) of the concentrated morphine, or roughly one-tenth of the contents of one multi-use vial of concentrated morphine. Given that the hospital's supply includes 100-200 multi-use vials, the amount of morphine wasted by Petitioner's actions constituted a small fraction of a percent of the hospital's regular morphine inventory.

Petitioner's conduct came to light after hospital staff noticed the two leaking pouches. When confronted with the evidence, Petitioner admitted that she had taken some of the morphine from her patients. Tr. II at 19-20, 73.

The State of Minnesota investigated bringing criminal charges against Petitioner. Tr. I at 42; Tr. IV at 187. The Minnesota Board of Medical Practice also assumed jurisdiction and suspended her medical license. Despite the otherwise inevitable prosecution by state authorities, the United States Attorney for the District of Minnesota elected to indict Petitioner under the Federal Anti-Tampering Statute.[2]

The evidence at trial established the local nature of Petitioner's crime and the trivial and attenuated impact her actions had on interstate commerce, if any at all. The morphine had reached the end-users -- the patients -- at the time of Petitioner's intervention. Because each patient would either consume the entire 50 milliliters of solution or any surplus would be discarded as medical waste, none of the morphine would be reused or returned to the hospital's supply. Accordingly, all of the morphine had exited the stream of commerce as of the time of Petitioner's wrongful acts.

The government attempted to prove an impact on interstate commerce by offering evidence about the

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[2] As will be discussed in greater detail *infra*, the Federal Anti-Tampering Statute was passed in the wake of a series of cyanide-poisoned Tylenol incidents. It was designed to address conduct having a national effect on consumer confidence by prohibiting certain discrete tamperings with consumer products that have a demonstrable impact on interstate commerce. See 18 U.S.C. § 1365; United States v. Levine, 41 F.3d 607, 615 (10th Cir. 1994) (anti-tampering statute passed Commerce Clause analysis because of negative commercial impact resulting from false public report of a syringe placed in a Pepsi can).

hospital's practice of ordering supplies. Not surprisingly, the government proved that the hospital would periodically order morphine to replenish its stock. The government then argued that Petitioner's personal consumption of morphine necessarily contributed to the overall depletion of the hospital's stock and, accordingly, would have resulted eventually in some amount of additional morphine being ordered from the in-state supplier. The government completed its "link" to interstate commerce by implying (without direct evidence) that the several milliliters Petitioner diverted, in turn, would have caused the in-state supplier to order an additional amount of morphine from its out-of-state wholesaler. Tr. V at 15.

The defense moved for a judgment of acquittal on the grounds that no impact on commerce was established because, whether the patients consumed all the morphine or Petitioner consumed some portion thereof, the hospital stock would be depleted by the same amount. The defense further argued that no actual impact was demonstrated because less than one of the 100-200 30-milliliter multi-use vials the hospital had in its stock would have been affected. The government agreed that any impact on interstate commerce would be "*de minimis,*" but maintained that it nevertheless satisfied the requirements of the Commerce Clause. Tr. III at 110-20.

The District Court denied Petitioner's motion on two alternative bases. First, the court concluded that the morphine "was still in the stream of commerce" because it had not "entered the patients' bloodstreams," though the court did not discuss how that fact resulted in an effect on interstate commerce. Second, despite the fact that the government offered no evidence whatsoever regarding the ordering of other pain medications, the court concluded that

Petitioner's conduct may have caused additional amounts of other pain medications to be administered which, in turn, theoretically could have affected interstate commerce. The court did not find that any effect on interstate commerce would have been "substantial," nor did it base its decision on any finding that Petitioner's conduct depleted the hospital's supply of morphine. United States v. Moyer, 985 F. Supp. 924, 926, App. at 4-5.

The Eighth Circuit Court of Appeals chose not to adopt the District Court's reasoning. It found jurisdiction existed under different theories, depending on whether the patient's pouch leaked. With respect to the two of the six morphine pouches that leaked, the Court of Appeals noted that they had to be replaced. United States v. Moyer, 182 F.3d at 1021, App. at 9. Because the two leaking pouches were replaced, the Court of Appeals conjectured that the supply of morphine may have been reduced in a manner that would support Commerce Clause jurisdiction for these two counts.[3]

With respect to the four pouches that did not leak, the Court of Appeals recognized that Petitioner's actions may not have had any incremental impact on the hospital's supply over what had already been prescribed. The Court of Appeals nonetheless affirmed the convictions, concluding that because Petitioner took morphine from her patients "before they could use it themselves . . . the reduction in

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[3] Each act of tampering with a specific pouch of morphine was charged as a separate count in the Indictment, with the exception of Count Three, which combined two pouches that were alleged to have been the subject of tampering on the same day.

supply was thus a result of her actions and not theirs." Id. at 1021, App. at 10. Without citation to any authority, the Eighth Circuit decided that "there was sufficient evidence from which the jury could find that Petitioner's tampering had an effect on interstate commerce." Id. at 1022, App. at 10. The Eighth Circuit, consistent with its past precedents, did not require the government to establish that Petitioner's actions had a "substantial effect" on interstate commerce. Accordingly, the court made no finding that the theoretical effect on the hospital's morphine supply would qualify as a substantial effect on interstate commerce.

REASONS FOR GRANTING THE PETITION

A. Section 1365(a) Must Be Construed To Require A Substantial Impact On Interstate Commerce In Order To Avoid Declaring The Statute Unconstitutional As Applied.

Statutes should be construed in a way that avoids the necessity of declaring them unconstitutional. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988). This Court recognized the role that constitutional issues play in statutory construction in granting certiorari in Jones v. United States, No. 99-5739, to determine whether the federal arson statute should be construed to apply to arson of a private residence, and, if so, whether its application was constitutional.

The statute at issue here, 18 U.S.C. § 1365(a), has its origins in 1982, when authorities in the Chicago area discovered that Tylenol, a nationally known painkiller, had been laced with cyanide, causing seven deaths. S.R. Rep. No. 98-69, at 3 (1983), *reprinted in* 1983 U.S.C.C.A.N.

1257.[4] Compounding these tragic deaths was a spate of "copycat poisonings" across the country accomplished by the insertion of deadly poisons and objects into food and drug products. These events in turn inspired an increase in false terroristic claims that consumer products had been adulterated, causing widespread consumer rejection and manufacturer recalls of the supposedly affected products. Id.

The resulting profound nation-wide impact on consumer confidence in products of all sorts prompted congressional action. Congress acted quickly and passed a consumer product tampering bill within several months of the Chicago deaths. Id. at 1258. The first bill, however, was vetoed by President Reagan. Congress then reenacted the legislation, which it described as "urgently needed to counteract the wave of tamperings sweeping the country, and to restore confidence in consumer products." Id. The statute ultimately became law in April of 1983.

The legislative history recognizes that Congress deliberately limited the scope of the statute to address activity that has a "national effect on consumer confidence." S.R. Rep. No. 98-69, at 3, 4-5 (1983) *reprinted in* 1983 U.S.C.C.A.N. 1257, 1258-59. In such circumstances, Congress concluded that "federal jurisdiction is clear and appropriate." Id. However, "the Committee [did] *not* intend that federal jurisdiction should extend to all tamperings." Id. at 1259 (emphasis added). The legislative history gives an

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[4] "[W]hen assessing the reach of a federal statute, [the Court] must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids." Dowling v. United States, 473 U.S. 207, 213 (1985).

example of a situation Congress deemed inappropriate for federal jurisdiction:

> When an individual buys a product, takes it home, puts poison in it and attempts to murder a family member with it, the results may be tragic, but the conduct is one that has traditionally been within the province of state or local authorities. Once the product is sold, and assuming it is not returned to the field of interstate or foreign commerce, the federal role should end.

Id.

The intended scope of the Federal Anti-Tampering Statute was thus appropriately limited. The statute was not intended to encompass purely local, non-commercial tampering that did not result in some substantial effect on interstate commerce.

The case at bar was not a Tylenol-type matter where the tampering caused a direct and substantial effect on commerce. Neither the hospital nor the patients were economically impacted by the tampering. Nor was any evidence offered that Petitioner's actions had any effect -- whether local or national -- on the public's confidence. Simply stated, this case had none of the commercial effects contemplated by Congress when it passed the Federal Anti-Tampering Statute.

Conduct that affects products outside of the stream of commerce "has traditionally been within the province of State and local authorities." S.R. Rep. No. 98-69, at 4 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1259. Cf., United States v. Sullivan, 332 U.S. 689, 697 (1948) (coverage under

Food, Drug & Cosmetic Act extends to "every article that had gone through interstate commerce until it finally reached the ultimate consumer"). Levine, 41 F.3d at 614, and United States v. Johnston, 42 F.3d 1328 (10th Cir. 1994), held that 18 U.S.C. § 1365 requires an impact on interstate commerce as a *result* of the tampering with the product. The Eighth Circuit's decision conflicts with Sullivan, Levine, and Johnston, and it also disregards the legislative history of the statute, because the morphine had been irrevocably removed from commerce at the time of the alleged tampering.

The decisions by the courts below expanded the scope of the statute beyond its constitutional boundaries. This Court should grant review to clarify that 18 U.S.C. § 1365(a) requires a substantial impact on commerce in order to avoid declaring the statute unconstitutional as applied to cases like this, where there is no substantial commercial effect.

B. Whether The Constitutional Requirements Of *Lopez* Apply To Statutes Containing A Jurisdictional Element Is A Recurring Issue Of Widespread Significance.

Because Congress does not have unlimited ability to pass criminal legislation, all federal criminal statutes must have some nexus to a federal constitutional power. As is true with 18 U.S.C. § 1365(a), this nexus is often found in the Commerce Clause of the United States Constitution, which grants Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, Section 8, Clause 3. The Commerce Clause gives Congress the power to regulate: (1) activities involving the *use* of channels of interstate commerce; (2) activities involving *instrumentalities* of

interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities *substantially affecting* interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

For many years, the permissible reach of the federal criminal law seemed boundless. In 1995, however, this Court in Lopez found limits to Congress' ability to transform an inherently intrastate activity into a federal crime. Lopez addressed the constitutionality of the Gun-Free School Zones Act, 18 U.S.C. § 922. The Court identified the issue as "whether an activity must '*affect*' or '*substantially affect*' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." Id. at 559 (emphasis added). Relying upon two longstanding principles of federalism, the Court determined that the Gun-Free School Zones Act was an invalid exercise of Congress' power under the Commerce Clause. First, under the federal system, the "states possess primary authority for defining and enforcing criminal law." Id. at 561, n.3. Second, when the federal government undertakes to criminalize conduct that the states already regulate, it effects a "change in the sensitive relation between federal and state criminal jurisdiction." Id. at 561, n.3 (citation omitted).

Under Lopez, at least where the statute at issue lacks an explicit jurisdictional element, conduct must "substantially affect" interstate commerce to fall within Congress' Commerce Clause power. As a consequence, a federal statute that does not contain a jurisdictional element -- in other words, a statute that does not require the regulated activity to have an "effect" on interstate commerce -- can only pass constitutional muster if the activity "substantially affects" interstate commerce. Id.

What Lopez left undecided, and what the Court should now address, is whether Congress may expand the constitutional limits of the federal criminal law merely by including within the statute a jurisdictional element. Specifically, can Congress criminalize local conduct that has only a *de minimis* impact on interstate commerce by the expedient of writing a statutory requirement that the activity "affect" interstate commerce? To countenance this state of affairs would enshrine a double standard for Commerce Clause analysis: a "substantially affects interstate commerce" standard for those few remaining statutes that do not contain a jurisdictional element, and a "*de minimis*" standard for those statutes that do contain a jurisdictional element.

Congress reacted to Lopez by amending the Gun-Free School Zone Act to include the jurisdictional element lacking in the original version. See United States v. Danks, 187 F.3d 643, 1999 WL 615445, at *1 (8th Cir. Aug. 13, 1999) petition for cert. filed, (U.S. Nov. 10, 1999) (No. 99-6982). In so doing, Congress has attempted to bypass the constitutional infirmities of the original statute, as found by Lopez, by requiring that the conduct "affect" commerce.

The problem with Congress' attempt to statutorily nullify Lopez is that Congress lacks authority to expand federal jurisdiction beyond constitutional limits.[5] Congress

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[5] "A jurisdictional element by itself cannot save a statute that exceeds congressional authority. The jurisdictional element must in some way be meaningful, and the Supreme Court has specified a condition for meaningfulness in its substantial effects test." United States v. Hickman, 179 F.3d 230, 240-41 (5th Cir. 1999) (equally divided en banc decision)

cannot trump the Commerce Clause by permitting federal prosecution of an activity "affecting" interstate commerce in only a trivial or *de minimis* fashion. Indeed, to permit Congress to do so would remove all restrictions on federal Commerce Clause jurisdiction. The courts have recognized time and again that "in view of our complex society, there is virtually nothing that does not affect interstate commerce in some manner . . . one can always find, with persistence, some effect on interstate commerce." United States v. McGuire, 178 F.3d 203, 209-10 (3rd Cir. 1999). If Lopez means only that a jurisdictional element written into a statute may be satisfied by a *de minimis* impact, there is no effective limit on Congress' ability to criminalize purely local conduct. The end result will be that, for the many statutes containing a jurisdictional element, only a *de minimis* impact on interstate commerce will be necessary to withstand constitutional scrutiny. United States v. Rea, 169 F.3d 1111, 1113 (8th Cir. 1999) (*de minimis* impact sufficient for arson prosecution).

Congress can and will be tempted to use the *de minimis* standard to increase dramatically the federalization of otherwise local activity. Numerous commentators have expressed concern about the recent increase in the federal government's jurisdiction over crime,

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(Higginbotham, dissenting). But see Fraternal Order of Police v. United States, 173 F.3d 898, 907 (D.C. Cir. 1999) (because the statute contains a jurisdictional element, "we join all the numbered circuits in rejecting" the argument that the Gun Control Act is beyond Congress' power to enact under the Commerce Clause).

much of it driven by unchecked political factors.[6] The American Bar Association has succinctly evaluated this "federalization phenomena" as follows:

> The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification, is moving the nation rapidly toward two broadly overlapping, parallel and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it.

American Bar Association, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law,* at 55 (1998).

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[6] See, e.g., Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover,* 31 HARV. C.R.-C.L.L. REV. 499 (1996) ("Since the 1970's, Congress has vastly increased the federal government's jurisdiction over crimes" largely by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters."); *Legislation: Chief Justice Criticizes Trend Toward Federalization of Crime*, 63 Crim. L. Rep. (BNA) No. 8 at 207-9 (May 20, 1998); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996) (noting the acceleration and "remarkably expansive" applications of the jurisdictional elements in the criminal statutes that exist).

To prevent Congress from legislatively executing an "end run" around Lopez, the Court should use this case, together with Jones, to clarify that conduct prosecuted under *all* federal criminal statutes, whether or not containing a jurisdictional element, must "substantially affect" interstate commerce to pass Commerce Clause muster. Any other decision will render Lopez a historical anomaly. As the Third Circuit in McGuire aptly stated in concluding that this Court intended to retain Lopez's vitality:

> We do not believe that the Supreme Court required Congress to include a jurisdictional element under Lopez only to have courts interpret the resulting statutes in such a way as to remove it.

178 F.3d at 212.

This case presents a set of facts from which the Court should announce constitutional principles that apply to federal prosecutions with little or no impact on commerce. In this case, the attenuated nature of the link to interstate commerce, as well as the efforts to stretch the bounds of the Commerce Clause, are evident from the array of arguments made to support jurisdiction. The Eighth Circuit hypothesized that the hospital inventory would be depleted because two of the six morphine pouches leaked and, therefore, had to be replaced, which might, in time, cause a small amount of morphine to move in interstate commerce. The government did not argue this at trial; the theory first arose on post-trial motions. The argument presumably would have undermined the government's claim at trial that jurisdiction existed for all counts where the patient had been administered his or her final pouch, obviating any impact on the hospital's morphine supply.

In addition to failing to explain how jurisdiction existed for the four counts that did not involve leaking pouches, the courts below failed to find a causal linkage between the two leaking pouches and any subsequent order of morphine by the hospital. As noted above, only the discarding of slightly more than three milliliters of morphine could be attributed to Petitioner's conduct. The entire amount of morphine in each of the two leaking pouches totaled only 13.4 milliliters of morphine (6.7 milliliters per pouch), an amount "so trivial or attenuated" that it should not suffice to establish jurisdiction. United States v. McGuire, 178 F.3d 203, 211 (3rd Cir. 1999) (reversing explosives conviction under 18 U.S.C. § 844 where effect on commerce is so trivial as to "obliterat[e] the intrastate/interstate distinction that was reinforced under *Lopez*").

C. The Circuits Are Divided On The Application Of *Lopez* To Statutes Containing A Jurisdictional Element.

Several circuits, including the Eighth Circuit, have construed Lopez so narrowly as to leave unchecked the proliferation of federal criminal statutes. Other circuits have held that Lopez imposes a uniform standard of Commerce Clause scrutiny on all federal criminal statutes, regardless of whether they contain an explicit jurisdictional element. For instance, the Ninth Circuit, in a case under the federal arson statute, has ruled that all federal statutes grounded upon the Commerce Clause must be confined to activity that substantially affects interstate commerce:

> Lopez clearly holds that the connections to or effect on interstate commerce must be "substantial." The question is whether its

> analysis should be applied when the issue is how significant the contacts to interstate commerce must be in individual cases in order to ensure the constitutionality of a statute that relies on a jurisdictional element. We hold that it does. *We conclude that in a case such as this, where Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a substantial effect on or connection to interstate commerce.*

United States v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995) (emphasis added).

The Third, Sixth, and Eleventh Circuits agree with the Ninth Circuit that Lopez requires proof of a substantial effect -- or, at least, more than a trivial impact -- on interstate commerce, regardless of whether the statute contains an explicit jurisdictional element. McGuire, 178 F.3d at 212 ("We do not believe that the Supreme Court required Congress to include a jurisdictional element under Lopez only to have courts interpret the resulting statutes in such a way as to remove it"); United States v. Latouf, 132 F.3d 320, 326 (6th Cir.), cert. denied 118 S. Ct. 1542 (1998) (substantial impact required for arson statute); United States v. Denalli, 73 F.3d 328, 330 (11th Cir. 1996) (court reversed conviction under federal arson statute because activity did not have a "substantial effect on interstate commerce"). But

see, United States v. Guerra, 164 F.3d 1358 (11th Cir. 1999) (only a *de minimis* impact on interstate commerce is necessary under the Hobbs Act).

The Eighth Circuit decision in Petitioner's case conflicts with the Third, Sixth, Ninth and Eleventh Circuits. The Eighth Circuit decision holds that *any* theoretical commercial effect, no matter how small or speculative, will suffice to support a conviction under a statute with an explicit jurisdictional element. This conclusion parallels that of the Seventh Circuit in United States v. Jones, 178 F.3d 479 (7th Cir. 1999), that a "slight connection" between a residential arson and interstate commerce satisfied the Commerce Clause.[7]

By granting the petition for certiorari in Jones, the Court has concluded that this Commerce Clause issue merits review. Petitioner submits that the Court could more fully resolve the important issues regarding federal jurisdiction under the Commerce Clause by also hearing this case. This case provides an opportunity to clarify that an offense involving non-commercial behavior and a product permanently removed from the stream of commerce may not be prosecuted in federal court absent a demonstrable, substantial impact on commerce.[8]

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[7] The Seventh Circuit in Jones asserted that it disagreed with the Eighth Circuit position that Lopez was irrelevant due to the jurisdictional element in the statute, but went on to reach the same end result -- permitting Commerce Clause jurisdiction despite the "slight connection" of a residential arson to interstate commerce. Jones, 178 F.3d at 481.

[8] This case presents a link to interstate commerce even more attenuated than the link in Jones. For instance, in Jones there

D. THE EIGHTH CIRCUIT'S DECISION IGNORES THE IMPORTANT DISTINCTION SET FORTH IN *LOPEZ* BETWEEN COMMERCIAL AND NON-COMMERCIAL CONDUCT.

The Court's decision in Lopez emphasized that the Gun-Free School Zones Act had "nothing to do with 'commerce' or any sort of economic enterprise." Lopez, 514 U.S. at 561. The same is true of Petitioner's conduct: It is not a "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Id. While a low level impact on commerce in an individual case may potentially pass constitutional muster when it arises from commercial activity or a regulation that governs economic activity, federal jurisdiction should not extend to purely local, non-economic activity absent a showing of a substantial impact on commerce.

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were multiple alleged connections to interstate commerce through insurers, lenders and utilities. Here, the only connection is the supply of morphine. More significantly, Jones presents a situation where one can more plausibly argue that the aggregate impact of arson is more likely to result in some substantial effect on interstate commerce. In the case at bar, the government has never attempted to argue that aggregating conduct like that of Petitioner's would be appropriate to show a substantial impact on interstate commerce, nor could it rationally do so, since the conduct is personal rather than economic. See Lopez, 514 U.S. at 558 (where a "general regulatory statute" bears a substantial relation to commerce, the *de minimis* impact of individual conduct is of no consequence).

The Third Circuit recognized this distinction in United States v. Rodia, ____ F.3d ____, 1999 WL 959625 at *6 (3rd Cir. Oct. 20, 1999), finding that the presence of a jurisdictional element does *not* ensure the constitutionality of a statute. The Third Circuit found that the jurisdictional element was "almost useless" because it could be met in virtually any case of alleged child pornography. In other words, the jurisdictional element failed to perform the function of guaranteeing a substantial impact on interstate commerce. Id. The Court, nevertheless, upheld the conviction on the grounds that Congress could reasonably have decided that the commercial aspects of intrastate possession of child pornography impacted the interstate market for such material. Cf. United States v. Rybar, 103 F.3d 273, 284 (3rd Cir. 1996) (rejecting the argument that the jurisdictional element suffices, yet applying "demand side" reasoning to uphold prohibition of intrastate possession of machine guns).

The Eastern District of Michigan recently required a substantial connection between murder and interstate commerce in order to bring charges under 18 U.S.C. § 1959. United States v. Garcia, ____ F. Supp. _____, 1999 WL 781362 at *4 (E.D. Mich. Sept. 22, 1999). The court drew a distinction between cases that involved "activities inherently affecting interstate commerce, such as money laundering and gambling" and cases that "involve more local or intrastate activities such as murder and assault." Id. at *5.

The Eighth Circuit failed to recognize this crucial distinction between "activities inherently affecting interstate commerce" and "local or intrastate activities such as murder and assault." The conduct that caused the federal government to prosecute Petitioner was her alleged abuse of

patients caused by her diversion of a portion of their prescribed medications. Petitioner neither obtained the medications through the market nor sought to sell them in the market. While the Commerce Clause compels a distinction between conduct involving economic conduct on the one hand, and offenses against persons on the other, it is clear that Petitioner's conduct falls in the latter category.

Moreover, the Eighth Circuit failed to recognize that the federal government stepped in and effectively usurped the role of the local prosecutors. In fact, local authorities began investigating Petitioner immediately upon the discovery of her crimes. If the federal government had not preempted the state investigation, Petitioner undoubtedly would have been prosecuted under one or more of the several Minnesota criminal statutes applicable to Petitioner's conduct, such as the crime of adulteration in violation of Minn. Stat. § 609.687, a felony-level statute similar to 18 U.S.C. § 1365(a), or abuse of a vulnerable adult in violation of Minn. Stat. § 609.2325, also a felony. In preempting the local prosecution of a local crime, the government tipped the delicate balance between state and federal relations by rushing into a matter that should have been left to local law enforcement authorities. Cf. Printz v. United States, 521 U.S. 898, 920 (1997) (noting that residual state sovereignty derives not only from the fact that only discrete, enumerated powers are conferred upon the federal government, but also from the Tenth Amendment which explicitly reserves all non-delegated powers unto the states). If only a theoretical, highly-attenuated impact on commerce is required to federalize this crime, federal prosecution of local offenses will know no bounds.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

1.	District Court Opinion	A-1
2.	Eighth Circuit Court of Appeals Opinion	A-6
3.	Order Denying Petition for Rehearing	A-14

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 97-167 (DSD/AJB)

United States of America,

Plaintiff,

v. **ORDER**

Nancy Lynne Moyer,

Defendant.

This matter is before the court on defendant's motion for a judgment of acquittal in accordance with Fed. R. Crim. P. 29(c). Based on a review of the file, record, and proceedings herein, the court denies defendant's motion.

BACKGROUND

Defendant was convicted on November 12, 1997, on Counts 1, 2, 3, and 5 of the indictment in this case, which alleged defendant had tampered with consumer products in violation of 18 U.S.C. § 1365(a), and counts 5-11, which alleged prescription fraud in violation of 21 U.S.C. § 843(a)(3). The jury returned a verdict of not guilty as to Count 4, another product tampering charge. The defendant now brings this motion pursuant to Fed. R. Crim. P. 29(c), asking the court to enter a judgment of acquittal on counts 1, 2, 3, and 5 of the indictment, the remaining product tampering convictions.

DISCUSSION

A motion for a judgment of acquittal challenges the sufficiency of the evidence. During the course of trial, when the evidence is insufficient to sustain a conviction, the court must, on motion of the defendant or its own motion, order the entry of a judgment of acquittal. Fed. R. Crim. P. 29(a). After the jury returns a verdict of guilty, the court may, on timely motion, set aside the verdict and enter a judgment of acquittal. Fed. R. Crim. P. 29(c). Jury verdicts, however, should not be lightly overturned. United States v. Hood, 51 F.3d 128, 129 (8th Cir. 1995). "[A] motion for a judgment of acquittal should be denied when . . . there is substantial evidence justifying an inference of guilt as found irrespective of any countervailing testimony that may be introduced." United States v. Huntsman, 959 F.2d 1429, 1436-37 (8th Cir. 1992), cert. denied, 506 U.S. 870 (1992) (quoting United States v. Rodriquez, 812 F.2d 414, 416 (8th Cir. 1987)). When reviewing the sufficiency of the evidence, the court examines the evidence and all reasonable inferences in the light most favorable to the government. Hood, 51 F.3d at 129. A verdict may be reversed only if the evidence is such that a reasonable jury must have entertained a reasonable doubt as to the government's proof on one of the essential elements of the offense. United States v. Yerks, 918 F.2d 1371, 1374 (8th Cir. 1990).

Defendant argues that "the jury verdict must be set aside and a judgment of acquittal entered because the government failed to prove beyond a reasonable doubt that the specific consumer products tampered with, i.e. the PCA cassettes, affected interstate commerce." Mem. in Supp. of Mot. for a J. of Acquittal (Docket No. 80) at 1. The court dealt with the interstate commerce requirement of 18 U.S.C.

§ 1365(a) in instruction number 32, which in its entirety reads:

> The phrase "affects interstate commerce" means to be involved in or to affect in some way the trade or business between one state and another state. The government does not have to prove that the affect is substantial. Instead, the government only needs to prove beyond a reasonable doubt that the defendant deliberately performed an act, the ordinary and natural consequences of which would be to affect commerce, and that commerce was, in fact, affected. It is not necessary for the government to prove that the defendant knew or intended that tampering with the consumer product would affect interstate commerce.

The government may meet its burden with respect to this element by proving a connection between interstate commerce and the consumer product that was the subject of the alleged tampering as described in the indictment. The connection may be proven by one of the three following means:

1. The government may prove that the consumer product was in the stream of commerce at the time the alleged tampering occurred; or

2. The government may prove that the tampering resulted in an affect on interstate commerce at the time of or after the tampering; or

3. The government may prove that the consumer product was placed back into the stream of commerce after the alleged tampering to it occurred.

Defendant contends that neither the first nor third methods apply in this case because the PCA cassettes had reached their ultimate consumers and were not in the stream of commerce at the time the tampering occurred, nor were the cassettes placed back into the stream of commerce after the tampering. Defendant also argues that the proof at trial failed to establish the existence of method two, as the government presented no proof that interstate commerce was affected by the tampering at or after the time of the tampering.

The government responds that a reasonable jury could find that defendant's conduct affected interstate commerce, as the morphine was still in interstate commerce at the time defendant tampered with the morphine[1] and the tampering affected Methodist Hospital's supply of morphine, haldol, versed, ativan, and propofol. See Mem. in Resp. to Def.'s Mot. for J. of Acquittal (Docket No. 81) at 3-4.

Whether the morphine contained in the PCA cassettes retained its interstate character at the time of the tampering or whether the tampering affected interstate commerce subsequent to defendant's actions, thus meeting the interstate commerce requirement of 18 U.S.C. § 1365(a), is a question of fact for the jury. United States v. Levine, 41 F.3d 607, 614 (10th Cir. 1994); United States v. Nukida, 8 F.3d 665,

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[1] While the defendant argues that the products tampered with are the PCA cassettes, the court agrees with the government that the relevant product is the morphine itself, and not the cassettes containing the morphine.

671 (9th Cir. 1993). The court finds that in this case a reasonable jury could find that the government had satisfied its burden of proof on the interstate commerce element of 18 U.S.C. § 1365(a).

The evidence proffered by the government at trial included testimony that some portion of the morphine prescribed for the relevant patients never reached those patients because defendant withdrew the morphine from the PCA cassettes before the morphine entered the patients' bloodstreams. The jury could therefore find that the morphine had not yet reached its end user and was still in the stream of commerce. In addition, the jury heard testimony that to control patients' agitation resulting from the then undetected decrease in their morphine intake, alternative medicines such as haldol, versed, ativan, and propofol were used. Because these medicines came to Methodist Hospital from out-of-state suppliers, a reasonable jury could find that defendant's tampering affected interstate commerce. Because a jury could so find, there is no basis for the court to conclude that the jury must have entertained a reasonable doubt as to the government's proof on the interstate commerce element of the offense. Yerks, 918 F.2d at 1374 (8th Cir. 1990). Defendant's motion must therefore be denied.

CONCLUSION

Based on a review of the file, record and proceedings herein, **IT IS HEREBY ORDERED** that defendant's motion for a judgment of acquittal is denied.

Dated: November 26, 1997

/s

David S. Doty, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1981

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the District
	*	of Minnesota
	*	
Nancy Lynne Moyer,	*	
	*	
Appellant.	*	

Submitted: October 20, 1998

Filed: July 23, 1999

Before FAGG, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Dr. Nancy Lynne Moyer stole morphine from the intravenous (IV) units of four patients who were under her care in the Intensive Care Unit of Methodist Hospital. On each occasion, Dr. Moyer inserted a hypodermic needle and

syringe into the patient's morphine delivery device, removed some of the morphine, and replace the stolen morphine with saline solution.

Based on this conduct, a jury convicted Dr. Moyer of four counts of tampering with a consumer product, *see* 18 U.S.C. § 1365(a)(4). The jury also convicted Dr. Moyer of six counts of obtaining a controlled substance through fraud, *see* 21 U.S.C. § 843(a)(3), for her use of forged prescriptions to obtain various narcotics. *See United States v. Moyer*, 985 F. Supp. 924 (D. Minn. 1997). On appeal, Dr. Moyer challenges the application of the tampering statute to her conduct, the sufficiency of the evidence to sustain her convictions for tampering, and the trial court's application of the federal sentencing guidelines to her case. We affirm the judgment of the trial court.[1]

I.

The tampering statute, *see* 18 U.S.C. § 1365(a), imposes criminal sanctions on anyone who, "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate . . . commerce." Although Dr. Moyer admits that she stole morphine from her patients' IV units, she contends that her conduct did not fall with the scope of this statute. She relies on the legislative history of § 1365(a) to argue that Congress intended the term "tampers" to include a malicious-intent requirement, that is, the performance of a malicious act that renders a consumer product dangerous. Dr. Moyer thus argues that her

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

convictions should be set aside because no evidence was adduced at trial that she acted with a specific intent to harm when she tampered with her patients' IV units.

We decline to read such a requirement into the statute, for we find no ambiguity whatsoever in its language. *See King v. Ahrens*, 16 F.3d 265, 271 (8th Cir. 1994) ("[when] 'the plain language of a statute is clear in its context, it is controlling'"), quoting *Blue Cross Association v. Harris*, 622 F.2d 972, 977 (8th Cir. 1980). The statute itself specifies the mental state required: A tamperer must act with "reckless disregard" and "extreme indifference" to the risks of death or bodily injury in which his or her act is placing another person.

We agree with the trial court, moreover, that in the context of this statute, the term "tampers" merely describes the physical act of product adulteration. A defendant's state of mind is not relevant to the ordinary meaning of the term, especially where, as here, other terms in the statute set forth the requisite state of mind in such a clear and unambiguous fashion. *See United States v. Jones*, 965 F.2d 1507, 1520 (8th Cir. 1992), *cert. denied*, 506 U.S. 924, 965 (1992), 508 U.S. 941 (1993) (where term is not defined by statute, it should be given its ordinary meaning). Under the plain language of § 1365(a), therefore, the government was required to prove only that Dr. Moyer tampered with her patients' IV units, and that she did so with reckless disregard and extreme indifference for the risk of death or bodily injury in which she placed her patients.

II.

The statute specifically requires that the government prove an effect on interstate commerce as an element of the

offense of tampering with a consumer product. *See* 18 U.S.C. § 1365(a). Dr. Moyer contends that the trial court should have granted her motion for a judgment of acquittal, *see* Fed. R. Crim. P. 29(c), on the tampering counts because the government failed to meet its burden of proof on this issue. We disagree.

A motion for a judgment of acquittal should be denied where the evidence, viewed in the light most favorable to the government, is such that a reasonable jury could have found each of the essential elements of the crime beyond a reasonable doubt. *See United States v. Hood*, 51 F.3d 128, 129 (8th Cir. 1995), and *United States v. Huntsman*, 959 F.2d 1429, 1436-37 (8th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992). After carefully reviewing the record, we believe that there was sufficient evidence from which a reasonable jury could find that Dr. Moyer's tampering with her patients' IV units had an effect on interstate commerce.

The evidence at trial tended to show that Methodist Hospital purchases additional morphine from a Minnesota supplier when its supply drops below a certain level, and that the morphine is manufactured outside Minnesota and shipped to the Minnesota supplier in response to orders. Witnesses testified that the morphine IV units of two patients began to leak after Dr. Moyer tampered with them, and that nurses had to replace those units with new units containing additional morphine for those patients. Methodist's pharmacist, moreover, testified that she ordered additional morphine to replace depleted supplies just a few days after Dr. Moyer had committed four of her six acts of tampering.

Based on this evidence, we think that a reasonable jury could find that Dr. Moyer's illicit use of her patients'

morphine contributed to the depletion of the hospital's morphine supply, which in turn required the hospital to order additional morphine. Because that morphine necessarily traveled to Minnesota from out-of-state manufacturers, we believe that a reasonable jury could find that Dr. Moyer's tampering affected interstate commerce.

Dr. Moyer contends that her use of the morphine had no effect on interstate commerce because the same amount of morphine would have been used whether the patients or Dr. Moyer herself consumed it. In other words, Dr. Moyer appears to argue that the government must prove that her tampering resulted in an incremental drop in supply over and above the reduction that would have resulted from her patients' normal use of the morphine. We disagree.

While it may be true that the patients' use of the morphine would have resulted in the very same depletion of the hospital's supply, such speculation is irrelevant to our analysis here. The fact remains that Dr. Moyer stole the morphine from her patients before they could use it themselves, and the reduction in supply was thus a result of her actions and not theirs. The subsequent effect on interstate commerce, therefore, was, as a matter of fact, a result of Dr. Moyer's theft of the morphine from her patients' IV units. We thus conclude that there was sufficient evidence from which the jury could find that Dr. Moyer's tampering had an effect on interstate commerce.

III.

Dr. Moyer also contends that the evidence at trial was insufficient to support the jury's finding that she acted "with reckless disregard," *see* 18 U.S.C. § 1365(a). On the contrary, we think that there is ample evidence in the record

to support the jury's finding that Dr. Moyer acted with reckless disregard of the serious health risks to which her actions exposed her critically ill patients. Expert witnesses testified that Dr. Moyer's actions created risks for her patients of increased pain, agitation, infection, and air embolism. Dr. Moyer herself testified at trial that she was aware at the time of the tamperings that her actions might be creating health risks for her patients.

There is also ample evidence in the record to support the jury's finding that Dr. Moyer acted with "extreme indifference," *id.*, to the risks that her conduct created for her patients. For example, the evidence at trial established that Dr. Moyer stole morphine on two separate occasions from the IV unit of an elderly patient who was dying of lung disease and was receiving morphine for "comfort care," that is, to ease her pain and agitation through the dying process. Witnesses testified that shortly after Dr. Moyer's first theft of the patient's morphine supply, nurses found the patient "awake and yelling" and replaced the leaking IV unit. The patient's daughter testified that she spoke to Dr. Moyer later that day and implored her to "do something" about her mother's inadequate sedation; Dr. Moyer assured her that she would correct the matter and would ensure that the mother did not suffer. Less than a day after making those promises to the daughter, Dr. Moyer stole morphine from the mother's new morphine IV unit. We have no doubt whatsoever that such egregious behavior provides overwhelming support for the jury's finding that Dr. Moyer acted under circumstances manifesting extreme indifference to the risk of pain and suffering to which her actions exposed the mother. There is, moreover, similarly sufficient evidence in the record to sustain the jury's finding of extreme indifference regarding the risks to which her actions exposed the other three patients.

IV.

Dr. Moyer objects to various jury instructions that described the elements that the government was required to prove to establish Dr. Moyer's criminal liability for tampering with consumer products. Those instructions, however, closely track the language of the statute and the relevant case law. We therefore find no error in the trial court's instructions.

V.

At her sentencing, Dr. Moyer requested a downward departure from the applicable guidelines range for convictions under the tampering statute, *see* U.S.S.G. § 2N1.1(a). The trial court denied the request, ruling that Dr. Moyer's conduct fell within the heartland of the statute and that no downward departure was warranted. We agree. Application note 1 to § 2N1.1 provides, "In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted." As the trial court correctly found, the evidence at trial established that Dr. Moyer's actions did expose her patients to risks of death or serious bodily injury, and this case is thus typical of the heartland of cases contemplated by the guidelines.

Finally, Dr. Moyer contends that the trial court erred when it departed upward from the applicable guidelines range and sentenced her to the statutory maximum of 48 months on each of her convictions for obtaining narcotics through the use of forged prescriptions. *See* 21 U.S.C. § 843(a)(3), § 843(d)(1). Because Dr. Moyer's sentences on

the prescription fraud counts run concurrent to, and are shorter than, her 70-month sentence on each of the consumer product tampering counts, any error in the length of the sentence im, osed is harmless and no remand is necessary. *See United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995).

VI.

For the foregoing reasons, we affirm the judgment of the trial court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 98-1981MNST

United States of America,	*	
	*	
Appellee,	*	
	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
	*	
Nancy Lynne Moyer,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. Judge McMillian would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

September 15, 1999

Order Entered at the Direction of the Court:

/s _____

Clerk, U.S. Court of Appeals, Eighth Circuit